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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee of the Estate of FRANK M. PINDEL, Bankrupt, and the BANK OF NEZPERCE,

Respondents.

In the Matter of Frank M. Pindel, Bankrupt.

REPLY BRIEF OF PETITIONER

EDWIN H. WILLIAMS,
of San Francisco, California, and
BEN F. TWEEDY,
of Lewiston, Idaho,
Attorneys for the Petitioner.

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It would require a brief of a great many pages to successfully and specifically and definitely deny all the untrue statements in respondents' brief as to all matters *de hors* the record. *Such a brief as the one filed by respondents should be stricken from the files.*

There was testimony introduced before the Referee, aggregating 2050 folios, trans. p. 86, *but this evidence is not before the Circuit Court of Appeals.* And not being before the Circuit Court of Appeals, the respondents make untrue and false statements concerning it, even asserting that the evidence in the former matter reviewed by the Circuit Court of Appeals is the same as that making 2050 folios in the case at bar.

Every finding of the Referee is supported by overwhelming evidence, and many of his findings supported by uncontradicted evidence. *Even the Learned District Judge did not change or modify any finding of the Referee.*

The question of the sufficiency of the evidence to support the facts as stated by the Referee and the Learned District Judge is not before the Circuit Court of Appeals at all, *and it is not assigned by the Petitioner that the evidence is insufficient to support the facts stated by the Referee and the District Court.* The petitioner does not ask the Circuit Court of Appeals to weigh the evidence. He merely has had the facts found by the Referee and the District Judge and their conclusions of law certified to the Circuit Court of Appeals so that the *conclusions of*

law of the District Judge may be reviewed and revised and corrected.

When only questions of law are presented for consideration it is an insult to the Honorable Circuit Court of Appeals for respondents to go outside of the certified record, and make statements which are not true, and which, if true, cannot be considered by the Honorable Circuit Court of Appeals.

However, these methods resorted to by respondents in their brief have been their tactics throughout the entire hearing before the Referee. *And such a brief as the respondents have filed should condemn both the Bank of Nezperce and the trustee.*

We did hope, indeed, that the respondents would discuss the questions of law and the petitioner's assignment of errors; *but we have been sadly disappointed.*

They dare not confine their brief to the questions of law presented by the record and assignment of errors. They are afraid of the facts found by the Referee and the District Court.

Mr. O'Neill made objection after objection at the trial, and most of them were repetitions. His tactics delayed the hearing and were most annoying. *But respect for the Honorable Circuit Court of Appeals commands us to keep within the certified record,*

though thereby we cannot also make statements dehors the record which would present the true facts touching the conduct of the Bank of Nezperce and the Trustee in the proceedings before the Referee, and all matters not certified to the Honorable Circuit Court of Appeals.

We trust the Court will carefully note all statements of respondents in their brief which are dehors the record.

By statements *dehors* the record, the respondents attempt to prejudice the Honorable Court of Apepals against the Referee. Much of the entire brief consists of these statements; and we cannot extend this brief at the expense of the petitioner to make statements of the exact facts as to the matters and things stated by respondents, and which are not supported by anything in the certified record.

We will refer, however, to one matter to show the malice and injustice of the respondents. At the close of taking the testimony by Mr. Walgamott, presented his bill to the bankrupt. At the same time, Mr. Walgamott presented a like bill, being for one-half, to Mr. O'Neill. Mr. O'Neill refused to pay the amount demanded.

Mr. Walgamott refused to turn the record of the evidence over to the Referee until Mr. O'Neill paid.

Therefore the Referee could not decide the case without the record. And finally, after sparring back and forth, Mr. Walgamott sued Mr. O'Neill and the Bank of Nezperce before the Probate Court of Lewis county.

Then Mr. O'Neill, or the Bank, applied to the District Court—Judge Deitrich—for some kind of orders against Mr. Walgamott, the Referee and the Probate Court. And some orders were made as we understand by Judge Deitrich against the Referee, Mr. Walgamott and the Probate Court. The controversy between the Bank and Mr. Walgamott was submitted to Judge Deitrich and was decided by him. Trans. p. 86. Neither the bankrupt or Mr. Tweedy had anything whatever to do with this controversy.

And it seems to us to be very unfair and unjust for the respondents to so scandalously attack the Referee on account of the controversy between Bank and Mr. Wolgamott. The Bankrupt paid Mr. Wolgamott the $256.25—one-half of his bill—promptly, but the Bank refused to pay its one-half which was $256.25.

We have given the facts as we understand them from Mr. Wolgamott. We could take up each attack upon the Referee based upon statements *dehors* the record and show them to be equally as unjust and

malicious. *The delay in Referee's decision was caused by Bank of Nezperce.*

The order of the District Judge on the Walgamott controversy, Trans. p. 86, has nothing whatever to do with the questions to be revised. *Either by mistake in the Pracipe or by mistake of the clerk that order was certified.*

Now, as we understand it, somewhere in respondent's brief it is stated dehors the record in substance that Mr. Walgamott was employed to delay the case. *The Bank of Nezperce agreed to pay one-half of the amount to be paid for the services of Mr. Walgamott,* trans. pp.86, 87 and 88, and got into a dispute with him and he held the record; *and now the respondents abuse the Referee.*

Of course a claimant which has made false proof of its claim would abuse the Referee. *This is nature,* especially when the Referee decides against such a claimant.

And, at this point in reply, we desire to direct attention to the Bank's proof of its claim, respondent's trans. p. 2, and ask the court to note that, *under oath* it is stated that nothing was paid on the claim or judgment but $1956.25. *This is false.* This $1956.25 is the amount realized on the execution sale of the residue of the attached property. Trans. p. 36. And

the $131.50 was not credited in the proof of claim as a payment on the judgment. For the balance after deducting this payment of $1956.50 was the claim approved and filed.

Now, the $131.50 is the amount derived from the attached property on order of the state court before final judgment. Trans. p. 24-25. The referee finds that: "In this case it is admitted that the claim of the Bank as originally filed was not correct." Trans. p. 31. Neither the $57.00 nor the $131.50 are credited on the claim or judgment as proved and filed. Trans. pp. 24 and 25. The District Court orders the $131.50 credited on the judgment or claim. Trans. p. 44. But the 57.00 has never been credited on the claim or judgment.

We ask the court to notice how respondents *endeavor to explain and excuse this fal se proof of their claim.* If the referee had allowed the claim as proved and filed, he would have defrauded the estate. *There is no escape from this conclusion.* This conclusion is established without saying anything about the damages of $4333.50, claimed by the estate at the trial before the Referee.

When was this false proof of claim corrected? Not until trial before Referee in 1913. And even now against the positive finding of the Referee that the

$57.00 was never credited on the judgment the respondents join in an assertion that the $57.00 is included in the $1956.25.

Why does the trustee join in the effort to have the Bank's claim allowed? *His attorney signs the brief with the attorney for the Bank of Nezperce.*

Now, what other reasons are there for the Honorable Referee not allowing the Bank's claim as proved and filed? The respondents *as we understand it,* assert that the reasons for the Referee not acting was negligence and his desire to delay settlement of estate. They say he did not allow other claims until 1913.

But let us consult the record again. *We find that an attachment was dissolved; that attached property was destroyed and wasted; that there was a void sale on execution;* that the attached property was of the value of $6522.00 when attached, and that the bankrupt and his estate have only got the benefit of $1956.25, and $57.00 and $131.50, after application of these amounts on the judgment, leaving exactly $4377.25 of the $6522.00 unaccounted for. In our original brief, we used $2000.00 as amount realized on execution sale, making therefore exactly $4333.50 of the $6522.00 unaccounted for. *This claim of the estate against the Bank of Nezperce is another good*

reason for the Referee not allowing the claim as proved and filed by the Bank.

Now closely examine the reasons the Bank and the Trustee urge in their brief and the reasons the learned District Judge urged in his decision *for depriving the estate of relief against the Bank for this* $4333.50. The reasons are all technical.

The learned District Judge presents the idea of laches, estoppel, res adjudicata, statutes of limitation, and that such damages cannot be a set-off under section 68 of the Bankrupt act; and the learned District Judge states the facts upon which his conclusions of law rest. *We object to his conclusions of law.* And we know that we have correctly presented his conclusions of law to the Honorable Circuit Court of Appeals for revision.

The Respondents present as reasons why the conclusions of law of the learned District Judge are correct upon the facts discussed by the learned Judge the following:

The judgment obtained by bank merges the damages of $4333.50, or any damage that might exist in favor of the bankrupt's estate; there was probable cause for the attachment; the Bank is not responsible for waste and deterioration of property; the recovery must be upon the attachment bond; there

must be no multiplicity of suits; the statutes of limitation; estoppel and laches; the execution sale was valid. *If the respondents present other reasons, the court will note them and consider them.*

In the case of Willman vs. Friedman,, 4 Idaho, 209, relied on by the learned District Judge and by the respondents to establish *res adjudicata,* an attachment was dissolved before answer and the right affirmed under section 4188, Codes of Idaho, to recover in main action on cross-complaint against the plaintiff. *This establishes that the attachment defendant has a right in Idaho to recover from the attaching plaintiff alone, without suing on attachment bond.*

In Idaho attachments can only be dissolved for improper or irregular issuance.

Mason, Ehrman & Co. vs. Lieuallen, 4 Idaho, 415;

Sections 4321, and 4323, Codes of Idaho.

Therefore, the question of probable cause or want of probable cause is not at issue on the motion to dissolve an attachment, and yet, where an attachment is dissolved before answer, the attaching defendant can recover on cross-complaint against the attaching plaintiff for actual damages. *The estate of the bankrupt only asks actual damages in the matter of*

allowance of claim under section 68 *Bankrupt Act.*

The respondents juggle the statutes of Idaho in the attempt to prove that all the damages of the estate are merged in the judgment of the Bank, and mix in the question of the multiplicity of suits. We *hope the court will consult the Revised Codes of Idaho,* and read the Idaho decisions carefully, and thereupon note the places or cases wherein section 4185, Codes of Idaho, is considered or referred to. *It is not referred to in the case of Wellman vs. Friedman, supra.*

Section 4185, supra, is relied on by respondents and the learned District Judge to merge all claims for wrongful attachment in the judgment of the Bank. In our opening brief, we have conclusively proven that section 4185, supra, does not so merge such damages in the judgment of the Bank; *and we have given the unanswerable reasons.* We need not repeat here.

Let us notice the question of multiplicity of suits. No doubt sections 4183, 4184, and 4188, Codes of Idaho, aim to provide a way for avoiding a multiplicity of suits. Equity has the same purpose. But the question of multiplicity of suits has no relation to res adjudicata or merging a cause of action in a judgment.

To illustrate: Section 4185, supra, prohibits independent actions on counter-claims under sub-division one of section 4184, supra, and does not apply to the second sub-division of section 4184, supra. *Consequently,* section 4185, supra, cannot merge in a judgment the counter-claims specified in the second subdivision of section 4184, supra. And as section 4185, supra, does not refer to section 4188, supra, at all, it, *therefore, cannot merge these cross-claims to be presented by cross-complaint in the judgment in main action in cases where these cross-demands have not been pleaded and adjudicated in fact.*

And again we demonstrated in our opening brief, the estate's cross-demand did not accrue until after the execution sale and could not be presented by cross-complaint in main action wherein bank recovered its judgment, *and the four theories upon which recovery can be had* are stated on pages 120 and 121 of our opening brief. And a re-discussion here might confuse the court.

The cross-demands were never in fact adjudicated in state court.

The execution sale is void. On pages 99 to 113 of their brief, the respondents seem to attempt to state that writs of attachment and execution are the same, and that the statutes require the writ of execution,

issued on a final judgment, to be directed and delivered by the clerk to the ex-sheriff who is holding the attached property under attachment. *This is absurd.*

Of course, the attachment statutes speak of the sheriff, and require the writ to be issued and delivered to a sheriff, but no attachment statute says that a writ of execution must be issued and delivered to an ex-sheriff *who may happen to have possession of property attached by him when he was a sheriff.*

The writ of execution is a new writ which had no existence while Mr. Lydon was a sheriff. Section 2045, respondent's brief, page 101, does not refer to an execution which had never been issued or delivered to Mr. Lydon when he was a sheriff. *Mr. Lydon could not deliver to his successor a writ he did not have.*

The execution, issued after final judgment, is levied on the attached property, and the possession of the property is thereafter held on the writ of execution to be sold at execution sale. Mr. Lydon never commenced executing the writ of execution which was not in existence before he ceased to be a sheriff.

The writ of attachment and of execution are separate and distinct, and used for vastly different purposes. So in section 2045, supra writs of attachment and execution are enumerated. *Mr. Lydon could not*

"deliver to his successor" the writ of execution simply because he had none to deliver.

"The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk and be directed to the sheriff * * * * * ," section 4471, Codes of Idaho. "Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part of it, is situated. Executions may be issued at the same time to different counties," Section 4476, Codes of Idaho.

Thus it is seen that the writ of execution must be directed and issued and delivered by the clerk to an actual sheriff of some county of Idaho. And Mr. Lydon was sheriff of no county of Idaho when the writ of execution was issued by the clerk on the 8th of March, 1909.

Consequently, the cases cited in the opening brief are directly in point and the cases cited by respondents are not in point, at all.

The court will be amused because of the attempt of respondents to explain and justify the bank's repudiation of the opportunity Mrs. Pindel gave it to get

its note and expenses paid by private sale of the attached property. The bank inroduced Mrs. Pindel's letter of July 10th, 1908, and, when it realized that it was the barrometer of its bad faith, it has striven to make its repudiation of the opportunity appear just and right.

The bankrupt merely relies upon this letter and upon the understanding with the bank to show to the court that the bank was given fair opportunity to get payment without litigation and without the waste and destruction of the attached property and that it was the Bank's repudiation of this opportunity which precipitated all the subsequent litigation and contention, and which prepared the way for the waste and destruction of the property.

Since this is true it is not within the right of the bank to escape responsibility for subsequent damages when it had the opportunity to avoid all damage and get full payment but repudiated the opportunity and forced the continuation of the process of the court against the bankdupt's property.

We do wish all the evidence was before the court so that the court would get the full measure of the contemptible meanness of the treatment of the bankrupt and his wife, but to print all the evidence is impossible and absolutely unnecessary. We are not pre-

senting to the court questions of fact. We are presenting only questions of law.

And the certified record presents all the questions of law to the court for revision and correction. For this purpose the record is complete.

For the Court of Appeals to determine whether there is a bar by limitation or res adjudicata, or a valid execution sale, or payment of judgment, or a set-off or a valid trustee's sale or other conclusions of law which are erroneous, needs no more or other record to be certified.

The question of the settlement of a solvent estate is presented by the record, and the record sufficiently presents every conclusion of law of the learned District Judge, and, from and upon the record, the Honorable Court of Appeals can determine whether the conclusions of law of the District Judge are correct or erroneous.

We regret, indeed, that the joint brief of respondents exhibits so much malice and passion, even though we know that such a brief clearly indicates to the court the want of a disposition of the respondents to do unto others as they would have others to do unto them. We think the brief should have been confined to the record, and that it should not have contained so much *dehors* the record.

The opinion of the Honorable Referee is dignified. He merely states the facts and discusses and decides the questions of law. No where does he show prejudice toward the Bank or the Trustee.

If he is to be condemned for rendering an impartial and able decision then it will be very difficult to secure the services of competent and able lawyers as Referees in Bankruptcy. *He is entitled to respect. He is entitled to respect just as much as is the Learned District Judge, or any other judge of a court.* I think all will agree to this statement.

The abuse of the Honorable Referee is not necessary to the consideration of the questions of law involved. Such abuse does not come with much force from the Bank of Nezperce when the record conclusively shows that in its proof of claim it did not give credit on the judgment for $131.50, which had been received by the attorney, or which Bank stands charged with acts which make it liable in a larger sum to the bankrupt's estate, and which indicate the absence of justice in all its transactions by the record presented and narrated and described.

To show a sample of unfair argument, we refer the court to pages 56 and 57 of respondent's brief. Neither the Honorable Referee or the Bankrupt's attorneys maintain or maintained that a levy on sufficient

personal property was or is a satisfaction of a judgment, but the proposition is that a levy on sufficient personal property to satisfy a judgment raises a *prima facie* presumption of payment to be rebutted by the judgment creditor, and that, where sufficient personal property has been levied on to satisfy the judgment and there has been waste and destruction of the property or a great part of it, the *prima facie* presumption of payment of the judgment becomes a conclusive presumption of payment.

Why should respondents put something in the mouth of the Referee or of the attorneys for the bankrupt and then cite authority to demolish a contention that neither advanced?

A close examination of the brief of respondents will demonstrate that their statements of the contention of bankrupt's attorneys, and of the rulings of the Referee and of the District Judge are as far from the truth as it is for them to assume that anybody has contended or ruled that thelevy on sufficient personal property is a satisfaction of a judgment.

That the questions of law now presented for revision have never been before the court in the hearing referred to by respondents in their brief is self-evident. Did the court allow the claim of the Bank

as proved and filed on the former hearing before the Court of Appeals? *That question was not involved, at all.*

Did the court in the former hearing have the same facts and questions of law as are presented by the record in the case at bar before it for decision? *Certainly, not.* Consequently, it is very foolish for respondents to contend that these facts and questions of law were before the court in the former hearing.

A trial of the objections to theallowance of the claim of the bank as proved and filed must be had before the issues as to its allowance can be before the court. *And there was no trial on these objections until* 1913.

There was no sale of the homestead until 1913. Consequently, *the bankrupt could not object to a confirmation until* 1913.

Never before has the question of ascertainment of the entire liability of the estate been before the court, nor the offer of bankrupt to pay everything in full, when ascertained. *The bankrupt proposes to pay everything in full, and the respondents have not proven that he cannot do so as soon as the entire responsibility is acsertained.*

Nor do we understand that respondents have attempted to establish in their brief that all of the

money ordered paid in by the District Judge to redeem the homestead will ever be needed for full payment of the entire liability of the estate.

There are many other weaknesses of the brief of respondents that we would like to disclose, *but we must conclude this brief.*

We feel that the errors of the learned District Judge in his conclusions of law must reverse his orders and require affirmance of the Referee, or else a reversal of his orders with directions to him to proceed according to law.

Respectfully submitted,

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